STATE OF MINNESOTA

IN SUPREME COURT

A21-1271

State of Minnesota,

Respondent,

vs.

Mal Pauliet Tharjiath,

Petitioner.

O R D E R

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Mal Pauliet Tharjiath for further review is denied.

Dated: May 16, 2023

BY THE COURT:

Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1271

State of Minnesota,
Respondent,

vs.

Mal Pauliet Tharjiath,
Appellant.

Filed March 6, 2023
Affirmed
Segal, Chief Judge

Washington County District Court
File No. 82-CR-19-2622

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kevin M. Magnuson, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges his convictions for fourth-degree criminal sexual conduct and fourth-degree assault, arguing that the district court committed reversible error when it

refused to provide a jury instruction defining specific intent. Appellant also argues that the postconviction court erred in denying his postconviction petition without a hearing. Appellant asserted in his postconviction petition that one of the jurors at his trial was not a Minnesota resident because she attended college in Wisconsin and that appellant was thus denied his constitutional right to be tried by a jury of Minnesota residents. We affirm.

FACTS

The convictions in this case arise from an assault of a correctional officer by appellant Mal Pauliet Tharjiath, who was an inmate at Minnesota Correctional Facility-Stillwater. The assault occurred in June 2019 when Tharjiath was being escorted to health services at the prison. Sergeant E.S., a female correctional officer,was on duty at the prison when she was called to escort Tharjiath to health services because Tharjiath was having trouble breathing. Another sergeant, a male correctional officer, was with Tharjiath when E.S. arrived. The male sergeant walked with E.S. and Tharjiath to the door that led out of the unit. From there, E.S. was Tharjiath's sole escort to health services.

To get to health services, E.S. had to bring Tharjiath through a series of locked doors with a sally port in between. After the first locked door closed behind them, but before E.S. opened the second locked door, Tharjiath "forced his hand between [E.S.'s] legs in an upwards motion and into [her] vagina which forced [her] underwear inside." The force of Tharjiath's motion pushed E.S. into the second locked door. E.S. tried to push Tharjiath away and told him to stop, but he continued to push upward between her legs, making "grunting noises" while doing so. Eventually, E.S. was able to push Tharjiath away, unlock

the second door, and close it behind her. Staff responded to Tharjiath and E.S. went to the hospital, where staff documented bruising on her inner thigh.

Respondent State of Minnesota charged Tharjiath with fourth-degree criminal sexual conduct and fourth-degree assault of a correctional employee. At trial, Tharjiath's defense theory was that he lacked the requisite sexual or aggressive intent to be guilty of fourth-degree criminal sexual conduct—he testified that his intent was to get the correctional facility staff to place him back in segregation.

Tharjiath explained that he had been in and out of segregation for six to nine months, but was moved back into the general population just before his assault of E.S. He was placed with a cellmate who refused to clean the cell, which caused Tharjiath anxiety. Tharjiath stated that he had previously been sent to segregation for being verbally abusive to officers, but that he did not think that strategy would work this time because he was inside his cell. He testified that when "you try to be verbally abusive" to an officer from inside your cell, "they['re] not going to pay it [any] mind and they walk past."

Tharjiath began to have difficulty breathing due to his anxiety, which prompted his escort to health services. He testified that during the escort he thought: "The only thing I want, I want to go back to segregation where I have my own cell and I can determine the level of cleanliness that I have." He said he only "assaulted the officer" to "go to segregation" and that his intent was not sexual or aggressive.

Based on that theory, Tharjiath requested that the district court instruct the jury on the difference between specific and general intent. The state objected, and the court denied

Tharjiath's motion, deciding "that adding a distinction definition between specific intent and general intent would likely be more confusing than instructive."

Following a two-day trial, the jury found Tharjiath guilty of both fourth-degree criminal sexual conduct and fourth-degree assault. The district court sentenced him to 120 months in prison on the sexual-conduct conviction and 12 months and one day on the assault conviction.

Tharjiath filed a direct appeal, and after the appeal was stayed by this court, filed a petition for postconviction relief in district court claiming that a juror was not a Minnesota resident and that his convictions must be reversed because he was denied his constitutional right to be tried before a jury of Minnesota residents. The postconviction court denied his petition without a hearing.

DECISION

Tharjiath makes two arguments on appeal. First, he argues that the district court committed reversible error when it refused to instruct the jury on the difference between specific and general intent. Second, he contends that the postconviction court erred in denying his postconviction petition without an evidentiary hearing because one of the jurors who decided his case stated during voir dire that she was a student in Wisconsin. Tharjiath asserts that the juror was thus not a Minnesota resident and that his petition demonstrated that he was denied his constitutional right to be tried before a jury of Minnesota residents. We address each argument below.

I. The district court's refusal to give Tharjiath's requested jury instruction does not require reversal of his conviction for fourth-degree criminal sexual conduct.

Tharjiath first argues that the district court erred by denying his request to include a definition of specific intent in the jury instructions for fourth-degree criminal sexual conduct. We review challenged jury instructions for an abuse of discretion. *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019). "While district courts have broad discretion to formulate appropriate jury instructions, a district court abuses its discretion if the jury instructions confuse, mislead, or materially misstate the law." *State v. Taylor*, 869 N.W.2d 1, 14-15 (Minn. 2015) (quotation omitted). "A mistaken jury instruction does not require a new trial if the error was harmless." *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006). An error is harmless when, "beyond a reasonable doubt, the error did not have a significant impact on the verdict." *State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989).

Fourth-degree criminal sexual conduct is a specific-intent crime as opposed to a general-intent crime. *See State v. Austin*, 788 N.W.2d 788, 793 (Minn. App. 2010), *rev. denied* (Minn. Dec. 14, 2010). Thus, to obtain a conviction for fourth-degree criminal sexual conduct in this case, the state had to prove not only that Tharjiath "engage[d] in sexual conduct with another person" by using coercion or force, but also that the sexual conduct was "committed with sexual or aggressive intent." Minn. Stat. §§ 609.345, subd. 1(c), .341, subd. 11(a) (2018).

The written instructions provided to the jury in this case for the fourth-degree criminal-sexual-conduct count tracked the statutory elements and provided in relevant part:

> Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person and uses force or coercion to accomplish the contact, is guilty of a crime.
>
> The elements of criminal sexual conduct in the fourth degree are:
>
> First, the defendant intentionally touched [E.S.'s] intimate parts or the clothing over the immediate area of [E.S.'s] intimate parts, . . . by force or coercion. . . .
>
> Second, the sexual contact occurred without the consent of [E.S.]. . . .
>
> Third, the defendant's act was committed with sexual or aggressive intent.
>
> Fourth, the defendant used force or coercion to accomplish the contact. . . .

The district court defined the terms "intimate parts," "consent," "force," "coercion," and "bodily harm," in the jury instructions, but did not define the phrase "sexual or aggressive intent." The district court advised the jurors that "[i]f I have not defined a word or phrase you should apply the common ordinary meaning to that word or phrase."

Tharjiath contends that the jurors needed an instruction on the distinction between specific and general intent "to be accurately informed of the law applicable to the case." Tharjiath did not, however, offer a specific jury instruction to the district court.[1]

Tharjiath relies on *State v. Johnson* in support of his argument. 374 N.W.2d 285 (Minn. App. 1985), *rev. denied* (Minn. Nov. 18, 1985). In *Johnson*, we held that the failure to provide an instruction on specific intent based on the facts of that case was a reversible

[1] In briefing to this court, Tharjiath suggested that the pattern jury instruction set out in the Minnesota Criminal Jury Instruction Guide (JIG) would suffice. That JIG provides that "'[w]ith intent to' or 'with intent that' means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act, if successful, will cause that result." 10 *Minnesota Practice*, CRIMJIG 3.32 (2022).

error. Johnson, the defendant in the case, was a farmer who had just finished planting a field at about 1:00 in the morning and was driving home when he was stopped by a police officer. *Id.* at 286. Johnson got out of the truck and the officer asked Johnson for his driver's license. Johnson advised the officer that he did not carry his wallet when he worked in the fields, that "he had been working all day and night," and that if the officer wanted to write him a ticket, he knew where to find him. *Id.* Johnson then got in his truck and left.

The officer followed Johnson with "lights flashing and siren whining." *Id.* Johnson testified "that he knew the police wanted him to stop, but he was tired and . . . wanted to get to his farm where he had his driver's license." *Id.* at 287. He also testified that, because he was driving a truck with a trailer full of soybeans, he could not drive very fast and averaged only about 16 miles per hour. *Id.* The officer finally stopped Johnson by blocking him with a squad car and shooting out his tires. *Id.* at 286-87.

Johnson was charged with and convicted of fleeing a police officer. Fleeing a police officer is a specific-intent crime that requires proof that the defendant's actions were taken "with intent to attempt to elude a peace officer." *Id.* at 288 (emphasis omitted) (quotation omitted). The jury instructions included a definition of "elude" but provided no instruction on the meaning of "intent" to elude. *Id.* We reasoned that, because Johnson's "entire defense went to the question of intent," the failure to provide an instruction on the "essential element of intent"—while emphasizing and defining other elements of the crime—"could only have misled the jury." *Id.* at 289.

In contrast here, Tharjiath's intent at the time of the assault was not really at issue. Tharjiath testified at trial that he was upset that his cellmate had not cleaned their cell and that all he wanted was "to go back to segregation where [he would have his] own cell and [he] can determine the level of cleanliness that [he has]." He testified that he had tried being "verbally abusive to the [correctional officer]" and that is "usually [enough] to go to segregation." He explained, however, that because he was in his cell, behind bars, that "you [can] be verbally abusive to the [correctional officer]" and "they [are] not going to pay it [any] mind and they walk past."

While being escorted to health services, Tharjiath testified that he felt that the officers were "messing with [him] deliberately" because they had him in the sally port alone with a female correctional officer between two locked doors. While Tharjiath denied that he had acted with an aggressive intent toward E.S., he testified to the following in response to his counsel's questions:

> Q: So what happened next after you guys went to the sally port?
> A: That's definitely when I assaulted the officer.
>
> Q: And when you assaulted her, what was your intent?
> A: I was just trying to go to segregation. I was trying to go to segregation, you know. . . .
>
> Q: You intended to do what you needed to do to get to segregation; is that correct?
> A: That's right. That's right.

During cross-examination by the state, Tharjiath acknowledged that he could have committed other acts that would have likely placed him in segregation, such as spitting on an officer or shoving an officer. Tharjiath, who was initially being escorted to health

services by both a male and female officer, also admitted that he waited until he was alone with the female officer to assault her. Thus, as established by Tharjiath's own testimony, his intent was clear—to assault the female officer.

Tharjiath argues that his intent was at issue because his intent was not sexual or aggressive but was simply to get himself put back into segregation. Tharjiath, however, confuses motive with intent. *Cf. State v. Ness*, 707 N.W.2d 676, 687 (Minn. 2006) (distinguishing motive from intent, noting that "motive concerns external facts that create a desire in someone to do something, whereas intent is a state of mind in which an act is done consciously, with purpose"). Tharjiath's motive or goal in assaulting E.S. may have been to get back to segregation, but his intent—according to his own testimony—was to commit a physical assault against an officer of a serious enough nature to achieve his goal of being returned to segregation. We thus conclude that *Johnson* is distinguishable from the facts here and that the district court did not err in declining to provide an instruction on specific intent. *Cf. State v. Erdman*, 383 N.W.2d 331, 333 (Minn. App. 1986) (declining to extend the holding of *Johnson* beyond the "peculiar facts of the case" to require a specific-intent instruction when defendant had not requested such an instruction at trial), *rev. denied* (Minn. Apr. 24, 1986).

Moreover, even if we were to conclude that the district court's ruling was in error, it does not appear that Tharjiath suffered prejudice as a result. As explained above, intent was not really at issue at trial and thus it is highly unlikely that the absence of an instruction on specific intent misled the jury. *See Hall*, 722 N.W.2d at 477 (stating that "[a] mistaken jury instruction does not require a new trial if the error was harmless").

II. The postconviction court did not abuse its discretion by denying Tharjiath's postconviction petition without an evidentiary hearing.

Tharjiath's second argument is that the postconviction court erred by denying his petition for postconviction relief without an evidentiary hearing. Tharjiath claimed in his postconviction petition that his constitutional right to a jury drawn from the state and county or district where the crime was committed was violated when a juror, who he alleged was not a Minnesota resident, sat on his jury. U.S. Const. amend. VI; Minn. Const. art. I, § 6.

During voir dire, the district court asked, "Is there anyone who does not live in Washington County[, Minnesota]?" No one responded and the court said, "Good. That's the right answer." The district court then asked each prospective juror to provide a "thumbnail sketch" of themselves. Juror 13 responded by saying, "I'm from Forest Lake. I'm a student in Eau Claire and I work at Target." Tharjiath passed juror 13 for cause, as did the state, and neither party used a peremptory strike to remove her from the panel. Juror 13 was thus seated on the jury.

Minnesota law "authorizes 'a person convicted of a crime' to seek postconviction relief by filing a petition claiming that the conviction 'violated the person's rights under the Constitution or laws of the United States or of the state.'" *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018) (quoting Minn. Stat. § 590.01, subd. 1(1) (2016)). When a petition for postconviction relief is filed, the postconviction court must hold an evidentiary hearing "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1

(2020). "In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner." *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017).

An appellate court reviews "a postconviction court's summary denial of a petition for postconviction relief for an abuse of discretion." *Andersen*, 913 N.W.2d at 422. "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Brown*, 895 N.W.2d at 617 (quotation omitted). A postconviction court's legal determinations are reviewed de novo, and its factual findings are reviewed for clear error. *Id.*

The postconviction court denied Tharjiath's petition without holding an evidentiary hearing because Tharjiath raised no objection to juror 13 at trial, the juror did not mislead or misrepresent her residency during voir dire, and the juror could be a resident of Minnesota under Minnesota law despite being a student in Eau Claire, Wisconsin.

Minnesota Rule of Criminal Procedure 26.02 permits a defendant to challenge a juror for cause for "[t]he lack of any qualification prescribed by law." Minn. R. Crim. P. 26.02, subd. 5(1). Such a challenge, however, must be made, at the latest, "before all the jurors constituting the jury are sworn." Minn. R. Crim. P. 26.02, subd. 5(2). Here, Tharjiath passed juror 13 for cause and did not otherwise object to the seating of juror 13 at any time during the trial.

The caselaw is clear that complaints regarding juror qualifications are waived when there is no challenge at trial. *See State v. Coles*, 328 N.W.2d 157, 158-59 (Minn. 1983) (rejecting defendant's argument "that a new trial is required because one of the jurors who

tried him and found him guilty was a resident of a different county" in part due to the lack of evidence that defendant had preserved the error); *State v. Olson*, 263 N.W. 437, 439 (Minn. 1935) (holding that the appellant had waived the issue of a juror's potential lack of Minnesota residency where there was no objection at trial); *State v. Lilja*, 193 N.W. 178, 180 (Minn. 1923) ("By proceeding with the trial to a final conclusion without objection and with full knowledge of the facts, defendant waived whatever right he may have had to challenge the competency of the jurors."); *State v. Geleneau*, 873 N.W.2d 373, 386 (Minn. App. 2015) (declining to consider appellant's "argument that the district court erred by not dismissing two prospective jurors for cause *sua sponte* because [appellant at trial] expressly waived his right to assert a challenge for cause"), *rev. denied* (Minn. Mar. 29, 2016).

Though Tharjiath raised no objection concerning juror 13 at trial, he asserts that his argument is still preserved "because juror 13 did not give an accurate answer about where she lived" during voir dire. Specifically, Tharjiath argues that, because juror 13 did not respond when the district court asked whether anyone did not live in Washington County, the truth regarding juror 13's residence was "obscured" and he can still bring his claim. Tharjiath's argument, however, is based on nothing more than sheer speculation. Juror 13's nonresponse to the question meant, on its face, that juror 13 considered herself a resident of Washington County, Minnesota. Juror 13 also forthrightly stated that she is "a student in Eau Claire." Moreover, juror 13's attendance at college was emphasized when defense counsel asked juror 13 to talk "about a big decision that [she had] made in the last year," and juror 13 responded, "Probably going to college and choosing colleges." This is therefore not a case where new information came out later or where the juror "hid"

information or misled the court and parties. Tharjiath had the very same information at the time of voir dire that he relied on in his postconviction petition. We are thus not persuaded by his argument that the truth of juror 13's residency was obscured.

Tharjiath also argues that his challenge to juror 13's constitutional competency cannot be forfeited because it is a structural error that requires automatic reversal. However, cases such as *Coles*, *Olson*, *Lilja*, and *Geleneau* cited above also refute Tharjiath's argument that the seating of a juror, without objection, who lacks the proper residency is a structural error that requires automatic reversal. *See also Pulczinski v. State*, 972 N.W.2d 347, 356 (Minn. 2022).

Tharjiath waived his argument about juror 13's residency by passing juror 13 for cause.[2] The postconviction court thus did not err in denying Tharjiath's postconviction petition without an evidentiary hearing because "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1.

Affirmed.

[2] Because we affirm the district court's denial of the postconviction petition on waiver grounds, we need not address Tharjiath's argument that the district court erred by relying on residency definitions in Minnesota's election and tax laws in determining that juror 13 could be a Minnesota resident while attending an out-of-state college.